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Uniform Commercial Code, Article 2 on Sales: Some Observations on Four Fundamentals

By Norman D. Lattin*

On January 1, 1965, the California version of the Uniform Commercial Code became effective as to transactions and events whose factual bases occurred subsequent to that date; however, the several acts which have been displaced by this new code remain effective as to transactions entered into prior to that time.¹ The student not yet admitted to the profession must absorb the essence of the common law and of legislation preceding this new code and its interpretation by the courts, as well as a knowledge of the code and of the major interpretations made of the code as adopted and already in operation in a number of jurisdictions in the United States.² He should be cognizant of the important differences between the California Commercial Code and the official Uniform Commercial Code, since he will eventually deal with problems involving the law of other states whose enactment of the official draft has been more generously aimed at making commercial law uniform.³ The practicing lawyer must reexamine what he has previously learned in the commercial law area and absorb what is new or seems to be new under the code.

There is little doubt that the Uniform Commercial Code is the most important single enactment into law of commercial doctrine that

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¹ Professor of Law, Hastings College of the Law.
² CAL. COMM. CODE § 10101. The Uniform Commercial Code is in effect in the following states, the time of taking effect being stated in parentheses: Alaska (Jan. 1, 1963); Arkansas (Jan. 1, 1962); California (Jan. 1, 1965); Connecticut (Oct. 1, 1961); District of Columbia (Jan. 1, 1965); Georgia (Jan. 1, 1964); Illinois (July 2, 1962); Indiana (July 1, 1964); Kentucky (July 1, 1960); Maine (Dec. 31, 1964); Maryland (Feb. 1, 1964); Massachusetts (Oct. 1, 1958); Michigan (Jan. 1, 1964); Montana (Jan. 2, 1965); New Hampshire (July 1, 1961); New Jersey (Jan. 1, 1963); New Mexico (Jan. 1, 1962); New York (Sept. 27, 1964); Ohio (July 1, 1962); Oklahoma (Jan. 1, 1963); Oregon (Sept. 1, 1963); Pennsylvania (July 1, 1954); Rhode Island (Jan. 2, 1962); Tennessee (July 1, 1964); West Virginia (July 1, 1964); Wyoming (Jan. 2, 1962).
³ CAL. COMM. CODE § 1102, particularly subsection (2)(c) expressing one underlying purpose and policy of the code to be “to make uniform the law among the various jurisdictions.”
this country has experienced. This is not to say that preceding uniform legislation was not important. At the time it was recommended and adopted in many states it was vital and in accord with the business tradition of the time and place. But business practices change and unless such legislation is broadly enough framed to permit new and desirable business practices by judicial interpretation the law is likely to become barren because of its impotency to recognize this change. The new code, while aimed at uniformity, permits the elasticity so necessary in the law of so dynamic an area as that of commercial practices. Where the code does not provide otherwise, its provisions may be varied by agreement thus making it possible through the drafting of contracts and documents to make the law the parties favor. This, of course, has been possible without legislative aid from the earliest times. However, under the code, even by agreement the parties may not disclaim the obligations of good faith, diligence, reasonableness and care.

The purpose of this article is to discuss some fundamental matters involving Article 2 on Sales. Those trained in the law of sales of personality at common law and under the Uniform Sales Act will have to wrestle with these matters on a somewhat different basis because of change of terminology, or theory of recovery, or substantive law itself. Matters primarily concerned with basic contract law such as offer and acceptance, the necessity of consideration, unconscionable contracts, et cetera, will not be considered here except incidentally, although the code contains several very important changes in the law concerning such matters. The areas to be considered here are: (1) distinctions made between professionals and nonprofessionals in sales transactions; (2) matters of title and risk of loss under the code; (3) types of goods—"movables" under the code; and (4) the Statute of Frauds.

**Professionals and Nonprofessionals**

When merchants deal with merchants, the ground rules are usually known by them and, understandably, may differ from those applicable to nonmerchants and ultimate consumers whose knowledge of such

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4 CAL. COMM. CODE § 1102(2) states that, "Underlying purposes and policies of this code are (a) To simplify, clarify and modernize the law governing commercial transactions; (b) To permit the continued expansion of commercial practices through custom, usage and agreement of the parties. . . ."

5 CAL. COMM. CODE §§ 1102(3)-02(4).

rules is limited. The code in a number of its sections so distinguishes and thus departs in material respect from the Uniform Sales Act approach. The term “merchant” is defined as: “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.” And “between merchants” means: “any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.” The inexperienced seller or buyer who is not a merchant may thus come within the special rules by employing an agent whose occupation carries a connotation of such knowledge or skill, whereas had he dealt personally the special rules would not have applied. This may offer some unanticipated dangers to the non-professional buyer or seller who deals through one who comes within the description of this provision. Furthermore, “the professional status under the definition may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both . . . .” Thus a nonmerchant because of his specialized knowledge may find himself in the professional class.

The “between merchants” description has importance in its application to the Statute of Frauds. For instance, a prompt writing in confirmation of an oral contract for the sale and purchase of goods for the price of 500 dollars or more which is sufficient against the sender-merchant will bind the receiver if he has reason to know its contents and if it is sufficient to indicate that a contract for sale has been made, unless his written notice of objection to its contents is given within ten days of its receipt. Thus, the receiving merchant may be bound although he has never signed a contract or memorandum.

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7 CAL. COMM. CODE § 2104(1).
9 Unifomr Commercial Code § 2-104, comment 2 [hereinafter cited as U.C.C.].
10 CAL. COMM. CODE § 2201(2). Although, note the ease by which a signature may be found under the code. “Signed’ includes any symbol executed or adopted by a party with present intention to authenticate a writing.” U.C.C. § 1-201(39). The official comment enlarges upon this: “Authentication may be printed, stamped or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. No catalog of possible authentications can be complete and the court must use common sense and commercial experience in passing upon these matters. The question always is whether the symbol was executed or adopted by the party with present intention to authenticate the writing.”
Furthermore, a firm written offer by a merchant to buy or sell goods giving assurance that such offer will remain open is binding and irrevocable on the offeror-merchant, though not supported by consideration, for the time stated, or if no time is stated then for a reasonable time, but in no event can the time exceed three months. And where an acceptance of an offer or a written confirmation contains additional or different terms from those offered or agreed upon, this ordinarily operates as an acceptance (unless acceptance is expressly made conditional on assent to the additional or different terms), the additional terms being construed merely as proposals for addition to the contract. But as between merchants the additional terms become part of the contract unless the offer expressly limits acceptance to its terms, or unless the additional terms materially alter the contract, or a prompt notification of objection to the terms is given or one has previously been given.

There will be disagreement as to what additional or different terms "materially alter" such an offer though the comment to the official code gives some examples of what normally will or will not be considered material. Commercial usage will play an important part in solving this problem as it does in other parts of the code. The offeror may always protect himself by confining the offeree's accept-

13 "4. Examples of typical clauses which would normally 'materially alter' the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches; a clause requiring a guaranty of 90% or 100% deliveries in a case such as a contract by cannery, where the usage of the trade allows greater quantity leeways; a clause reserving to the seller the power to cancel upon the buyer's failure to meet any invoice when due; a clause requiring that complaints be made in a time materially shorter than customary or reasonable.

"5. Examples of clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are: a clause setting forth and perhaps enlarging slightly upon the seller's exemption due to supervening causes beyond his control, similar to those covered by the provision of this Article on merchant's excuse by failure of presupposed conditions or a clause fixing in advance any reasonable formula of proration under such circumstances; a clause fixing a reasonable time for complaints within customary limits, or in the case of a purchase for sub-sale, providing for inspection by the sub-purchaser; a clause providing for interest on overdue invoices or fixing the seller's standard credit terms where they are within the range of trade practice and do not limit any credit bargained for; a clause limiting the right of rejection for defects which fall within the customary trade tolerances for acceptance 'with adjustment' or otherwise limiting remedy in a reasonable manner (see Sections 2-718 and 2-719)." U.C.C. § 2-207, comments 4-5.
ance to the terms of the offer. And, quite naturally, if two merchants have used their own confirming forms and there are conflicting provisions, each has notice of the other's conflicting terms without further notice. The contract will then consist of the terms originally expressly agreed to, plus those on which their confirmations agree, plus the terms which do not materially alter the offer, if such there be. The rule requiring an exact matching of the acceptance with the terms of the offer, a rule which has frequently been an unanticipated trap in contract law, now, through the adoption of a merchant's concept of a more practical approach, must bow to this new concept.

Under the provisions of the official code an oral modification or rescission of a written and signed sales contract is valid without consideration except where it comes within the provisions of the Statute of Frauds or when the signed agreement excludes modification or rescission except by a signed writing. But: "except as between merchants such a requirement [which excludes modification or rescission except by a signed writing] on a form supplied by the merchant must be separately signed by the other party." The California version of this section omits all reference to merchants and to the Statute of Frauds, thus putting merchants and nonmerchants on the same footing. It provides that modification of a written contract may only be made by a written agreement or by an oral agreement which has been fully executed by both parties. The purpose of the official code provision as stated in a comment to it is "to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments." The California version simplifies the paper work in such cases by establishing its own Statute of Frauds in this area thus making it necessary to have a written modification or an oral agreement fully executed by both parties where modification is made in written contracts whether they come within or without the 500 dollar area. There is saving grace, however, in the provision in subsection 4 of the same section, which allows, but does not require, the attempt at modification or rescission to operate as a waiver when it does not satisfy the written requirement. Thus an oral waiver which has been relied upon and resulted in a change of position to the detriment of the waivee clears

15 U.C.C. § 2-209(2).
16 CAL. COMM. CODE § 2209(2).
17 U.C.C. § 2-209, comment 1.
18 CAL. COMM. CODE § 2209(4).
the hurdle of even the Statute of Frauds. In this approach the California version has followed its Civil Code provision that, "a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."\(^{19}\) There is something to be said for the California approach in this matter since the official code provision requires an additional signature by one who is not a merchant when the merchant has included in his form a provision that the contract may only be modified by a writing. Thus far, of thirty adoptions of the code, California is the only state which has seen fit to revamp this section.

The "merchant" classification also becomes important in the area of warranty. An implied warranty of merchantability in a contract for the sale of goods exists if the seller is a merchant with respect to goods of that kind unless such warranty is excluded or modified by the agreement.\(^{20}\) Even though the seller is not a merchant as here defined, if he guarantees generally the goods, section 2314 may be used as a guide concerning the "content of the resulting express warranty."\(^{21}\) Thus, even though the seller is not a merchant, if the suggestion of the official comment is accepted by the court, he may be held to have expressly warranted those things which this section impliedly warrants where a merchant is involved. This may have "particular significance in the case of second-hand sales, and . . . further significance in limiting the effect of fine-print disclaimer clauses where their effect would be inconsistent with large-print assertions of guarantee."\(^{22}\)

In sales on approval where the buyer has duly notified his seller of his election to return the goods, a merchant-buyer is required to follow any reasonable instructions given him by his seller.\(^{23}\) Such instructions might, perhaps, include an order to sell in the local market or to forward the goods to a person designated by the seller. The risk of loss would remain on the seller during this additional period caused by the seller's demands, and the expense of the merchant-buyer would

\(^{19}\) CAL. CIV. CODE § 1698.

\(^{20}\) CAL. COMM. CODE § 2314(1). UNIFORM SALES ACT § 15 provides: "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality." The code provision spells out the several characteristics of merchantability thus making for certainty in an area where there was much difference of opinion. CAL. COMM. CODE § 2314(2).

\(^{21}\) U.C.C. § 2-314, comment 4.

\(^{22}\) Ibid.

\(^{23}\) CAL. COMM. CODE § 2327(1)c.
be the seller's liability as would reasonable compensation for carrying out the seller's instructions, such as a fee for selling the goods.\textsuperscript{24}

In general, the code has left it to other rules of law within the state where the goods are situated to determine the effect upon the seller's creditors of the retention of possession by a seller after the sale. However, where a merchant-seller has retained possession for not more than a "commercially reasonable time," in good faith and in the current course of trade, retention of the goods after a sale or identification to a contract of sale is not fraudulent.\textsuperscript{25} Here, again, a distinction has been made between professionals and nonprofessionals.

One of the most controversial provisions of the official code is that which gives a merchant who deals in goods of the kind entrusted to him the power to transfer all the rights of the entruster to a buyer in the ordinary course of business. Further, it is immaterial whether he procured the entrusting by methods which would constitute larceny in a criminal sense or whether, after he acquired their possession legally, he disposed of them in such a way as to lay him open to a criminal prosecution.\textsuperscript{26} That is, he may have embezzled them. Thus, were a watch left for repair with a jeweler who also deals in goods of that kind, a sale to a buyer in ordinary course would give good title to him. The entruster would have his remedy against the jeweler for conversion which would probably be of little value in a case of this kind. The California version has at least attempted to limit the application of the power to transfer to one who has been entrusted "for the purpose of sale, obtaining offers to purchase, locating a buyer, or the like . . . ."\textsuperscript{27} But there may be some question as to whether this is a limitaiton on the power of the entrustee or simply a partial description of what is included in the word "entrusting."\textsuperscript{28} If it is considered a limitation of power, there is still the possibility that the entruster will be estopped if the factual conditions warrant it, or that a court will find an implied authority to sell, obtain an offer, et cetera,
in accord with the California provision. The official code has adopted the English open market approach which favors the bona fide purchaser from a reputable dealer rather than the owner who has entrusted goods to the dealer. The subsection, however, apparently envisions within the term “larcenous” only the types of larceny where possession has been obtained by fraudulent means. Under the code, one who has obtained “title” by fraud may be held to have a voidable or defeasible title which in the hands of a bona fide purchaser for value becomes absolute. The code codifies, as did the Uniform Sales Act, this rule by providing: “A person with voidable title has power to transfer a good title to a good faith purchaser for value.”29 And such a voidable title holder need not be a merchant. But in a sale by a merchant entrusted with possession of goods, protection is given to a “buyer in ordinary course,” whereas in a sale by one having a voidable title protection is given to a bona fide purchaser for value. This becomes important since the code spells out the value term in a different manner from the consideration requirement of a “buyer in ordinary course.”30

There are also other important differences which must be reckoned with. One can more easily be a purchaser for value than a buyer in ordinary course as the terms are used in the code.31 And of course there will be many cases where one not a merchant, or a merchant who does not deal in goods of the kind is involved. If the “nonmerchant” has, by fraudulent representation amounting to obtaining personality by false pretenses, obtained a voidable title, that title becomes absolute in a bona fide purchaser for value.32 This section goes on to delineate the “power” (to transfer title) of one who has been delivered goods “under a transaction of purchase” as including cases where the transferor was deceived as to the identity of the purchaser, or where delivery was made for a check later dishonored, or where the agreement constituted a “cash sale,” as well as where delivery was obtained by fraudulent means punishable under the criminal law as larcenous.33

31 Ibid.
32 And this is made clearer (if possible) by Cal. Comm. Code § 2403(1): “When goods have been delivered under a transaction of purchase the purchaser has such power [to transfer a good title to a good faith purchaser for value] even though . . . “
33 Cal. Comm. Code § 2403(1)a,b,c,d.
There may be some controversy over what constitutes a “transaction of purchase,” but the apparent reason behind this important section is more fully to protect the good faith purchaser and, in order to do that, the phrase should be interpreted broadly rather than narrowly.

Another distinction based upon the difference between professionals and nonprofessionals is contained in section 2603. A merchant-buyer who rightfully rejects goods at a point where the seller has no agent or place of business is under a duty after rejection “of goods in his possession or control” to follow reasonable instructions given by the seller and if no instructions have been given and the goods are perishable or “threaten to decline in value speedily,” then to make reasonable efforts to sell them for the seller’s account. However, this section goes on to provide that if on demand by the buyer indemnity for expenses is not forthcoming from the seller, then any other instructions by the seller will be held unreasonable as a matter of law.\(^4\) This perhaps suggests an initial procedure which could result in practical benefit to the rejecting buyer. Subsection 2 of this section gives the rejecting buyer reimbursement from the proceeds of the sale for reasonable expenses of caring for and selling the rejected goods plus a commission for selling them. The buyer, in carrying out the provisions of this section, is held only to good faith conduct, and his sale in good faith constitutes neither acceptance nor conversion nor a basis for an action for damages.\(^5\) If the seller does not give any instructions within a reasonable time after notice of rejection, and if the goods are not of the perishable or speedily-declining-in-value type, the buyer may store the goods for the seller’s account, or reship them to the seller, or resell for the seller’s account with reimbursement for expenses and with a commission for their sale.\(^6\) These provisions have adopted the good faith and commercial practices which have grown up in the better commercial circles. One who is not a merchant-buyer, but who has rightfully rejected goods of which he has physical possession, has only the duty of holding the goods with reasonable

\(^4\) \text{CAL. COMM. CODE} § 2603(1). The section is framed in terms of “the market of rejection” at which the seller has no agent or place of business.

\(^5\) \text{CAL. COMM. CODE} § 2603(3). \text{U.C.C.} § 2-603(3), comment 1, states: “This section recognizes the duty imposed upon the merchant buyer by good faith and commercial practice to follow any reasonable instructions of the seller as to reshipping, storing, delivery to a third party, reselling or the like. Subsection (1) goes further and extends the duty to include the making of reasonable efforts to effect a salvage sale where the value of the goods is threatened and the seller’s instructions do not arrive in time to prevent serious loss.”

\(^6\) \text{CAL. COMM. CODE} § 2604.
care for a time sufficient for the seller to remove them. And this is so, whether the goods are perishable or not.

A further distinction between merchants and others also concerns the matter of rejection which, as between merchants, requires the rejecting merchant-buyer upon request by the merchant-seller in writing to provide a full and final written statement of all defects upon which the buyer proposes to rely. The buyer's failure to state a defect ascertainable by reasonable inspection precludes his reliance on such a defect either to justify rejection or establish breach. The failure to reply to the seller's request, or to fail to state defects which a reasonable search ought to have turned up, could be most damaging to the rejecting buyer. The practical advice to give one's client seems evident.

A distinction is also made in contracts of sale between merchants and between others when one of the merchants has reasonable grounds for believing the other may not be able to perform as required by the contract and demands assurance from the other of due performance. As between merchants "the reasonableness of grounds for insecurity and the adequacy of any assurance offered" is to be determined according to commercial standards. On the other hand, where one or both parties are not merchants and reasonable grounds exist for belief of insecurity, the insecure party, until he receives assurance for performance, may suspend his performance for which he has not yet received the agreed return if this would be "commercially reasonable." As to merchants, the reasonableness of the grounds for insecurity and the assurance of due performance may well differ from these incidents where merchants are not involved. As to both merchants and others, the failure of the one upon whom a justified demand has been made to provide within a reasonable time (not more than thirty days) adequate assurance constitutes a repudiation of the contract.

As to risk of loss in the absence of breach, the code makes no distinctions between merchants and nonmerchants where the contract requires or authorizes the seller to ship goods by carrier and where the

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37 CAL. COMM. CODE § 2602(2)(b). Subsection (2)(c) makes this doubly certain by providing that "the buyer has no further obligations with regard to goods rightfully rejected."

38 CAL. COMM. CODE § 2605(1)b.

39 CAL. COMM. CODE § 2609(2). The official comment is instructive on the matter of commercial standards.

40 CAL. COMM. CODE § 2609(1).

41 CAL. COMM. CODE § 2609(4).
goods are held by a bailee to be delivered without being moved, whether by negotiable document of title or otherwise. If not within these areas, the risk of loss passes to the buyer upon his physical receipt of the goods if his seller is a merchant. If his seller is not a merchant, risk passes to him on tender of delivery rather than upon receipt of the goods. However, the provisions of this section are subject to contrary agreement.42

The code approach in distinguishing between merchants and non-merchants is functionally desirable since it agrees with the evolution of the past half-century of customs and practices in the commercial community. The changes from the older law should be troublesome only to lawyers, while merchants will find that the new code is more in phase with their customary practices.

Matters of Title and Risk of Loss Under the Code—The Importance of Identification

At common law and under the Uniform Sales Act, lawyers have become accustomed to deal with many problems by what has become known as the “lump title” concept. Section 18 of the Uniform Sales Act provides that the intent of the parties controls in ascertaining where and when “title” passes to specific or ascertained goods. Since the parties rarely indicate this in their contracts, a series of inferences applicable to both specific and future goods is provided for in section 19 which provides, in the absence of such an intent indicated by word or act of the parties or usages of trade, a solution based upon their probable intent. For the most part the inferences were lifted from the English Sale of Goods Act of 1893 which was a codification of the then existing common law. However, there were errors in what was thought to be the common law of England and these purportedly were corrected in the American act.43 Nevertheless, under both acts the basic analytical concept is “title.” If it were a question of determining whether the purchase price could be collected, or whether the risk of loss was on one or the other party, or whether some tax on the chattel should be paid by one or the other party, or whether an attaching creditor of one or the other could claim an interest in the goods, or whether a bona fide purchaser from the buyer in possession could succeed against the seller, et cetera, the title approach was the one used. While title and risk of loss could be separated by agreement

it was a rare case where the contract provided for this. And any discerning student of the cases soon discovered that, in many instances, it was just as reasonable for the court to hold that title was in the party not receiving the judgment. The uncertainty of such an approach, especially in the highly complex commercial community of today, was sufficient justification for a change to an approach diametrically opposed to that of the lump title concept.

Title under the code is of small consequence except for the few provisions which specifically mention it or under circumstances not provided for in the code.* The rights, obligations and remedies of seller, buyer, purchasers and other third parties must be sought for in other provisions of the code.* If specific situations are not covered by other provisions of the code and title matters become material, the code has set up some title rules. Explicit agreement of the parties may settle the time and place of title's passing. However, unless otherwise explicitly agreed, title passes at the time and place "at which the seller completes his performance with reference to the physical delivery of the goods." Apart from actual physical delivery to the buyer, when the seller is authorized or is under contract to send the goods to the buyer, but not to deliver them at destination, title passes to the buyer on delivery to the carrier and if the contract requires the seller to deliver at destination, title passes on "tender" there. There are also special provisions concerning passage of title where delivery is to be made without moving the goods, whether the transaction was by document or not. But the clincher comes in the last subsection of section 2401 which provides: "A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a 'sale.'" Thus, despite title's having passed, if the buyer has not accomplished an

* See, e.g., on risk of loss, Cal. Comm. Code §§ 2509-10; on acceptance (Cal. Comm. Code § 2606) of the goods as a point from which the buyer cannot renege but must pay the price, Cal. Comm. Code § 2607(1); on specific performance, Cal. Comm. Code § 2716; on recovery of the price where goods have been identified to the contract and the seller after reasonable effort is unable to resell them at a reasonable price, Cal. Comm. Code § 2709(1)(b). Sale, however, is defined as consisting of "the passing of title from the seller to the buyer for a price." Cal. Comm. Code § 2106(1).
* Cal. Comm. Code § 2401(4). The provisions of this section are important in ascertaining such matters as who is the "owner" for the purpose of taxation, for the purpose of resale, etc.
acceptance of the goods, or if he has accepted and has cause for a justified rejection, he will not be liable for the price simply because title has passed somewhere along the line. This is a quite different approach from that of the Uniform Sales Act under which the passage of title to the buyer gives the seller an action for the price of the goods[40] and the buyer a right to the goods which may be enforced in equity as well as law, even though remedies at law in many such cases are adequate.[50] In such situations the title concept under the old legislation resulted in informal specific performance[51] as well as putting the risk of loss on the buyer even when the goods were under the control and in the possession of the seller.[52] Of course the courts did not speak of the title concept as being a form of specific performance though manifestly it was. Now, under the code, there is more emphasis on a diversified scheme of analytical tools which allows the jurist greater precision in fitting the law to the specific factual situation.

Those trained in the law of sales under prior law will remember that in contracts for the sale of goods not yet identified so as to be classified as “specific goods” there had to be an “appropriation” by one party with the consent of the other before title was assumed to pass.[53] Appropriation in the Uniform Sales Act sense becomes unimportant under the code. “Identification” (the term used in the code) takes on a limited function under the code. It has little to do with title. It may be explicitly provided for as to time and place of occurrence by the agreement of the parties. In the absence of explicit agreement, as to goods already existing and identified, it occurs at the time the contract of sale is made. And as to goods not both existing and identified (i.e., future goods),[54] it occurs “when the goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers.”[55] It may even exist when the goods so identified do not conform to those ordered so that the buyer has an option to return or reject them.[56] A special provision has reference to future goods in the form of crops and the “unborn young” of animals by enacting that identification occurs at the time the crops are planted

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[40] Uniform Sales Act § 63.
[51] Ibid.
[52] Uniform Sales Act § 22.
or otherwise become growing crops, and when the young are con-
ceived.57 The old doctrine of potential possession has been abandoned,
as it was in the Uniform Sales Act.

By identification of goods to the contract, the buyer obtains an
insurable interest and a "special property" in the goods, and as long
as the seller retains title to or any security interest in the goods he
retains an insurable interest. Furthermore, when identification is
solely by the seller he may "until [his] default or insolvency or notifica-
tion to the buyer that the identification is final substitute other goods
for those identified."58

While identification of goods to the contract has a limited function,
it may be important in a number of factual situations. For example,
if the seller has become insolvent within ten days after receipt
of the first installment of the price, the special property interest aris-
ing from the seller's identification of the goods to the contract gives
the buyer the right to the goods where he has paid part or all of the
price, provided he keeps good his tender of any unpaid portion of the
price.59 And, if the seller has identified conforming goods and the buyer
repudiates or is otherwise in breach before the risk of loss has passed
to him, if the goods are destroyed or injured without the seller's fault,
the seller may to the extent of any deficiency in his effective insurance
treat the risk of loss as being on the buyer during a commercially
reasonable time.60 Again, if the seller has identified goods to the con-
tract but later fails to deliver or repudiates, the buyer may in a proper
case have specific performance, or a right to replevy the identified
goods provided his reasonable effort to effect cover has not resulted
in success or it is apparent that his efforts will not be effective.61

Identification of conforming goods in the seller's possession or
control which had not been identified at the time of the buyer's
breach is authorized after his breach, and this is so even though the
goods are unfinished provided they were "demonstrably intended"
for the particular contract. The seller may then treat such goods as a
subject for resale and thus establish his loss on resale as a basis for

57 CAL. COMM. CODE § 2501(1)(c). Compare U.C.C. § 2-501(1)(c), which con-
tains a limitation to young to be born within 12 months after contracting or crops to be
harvested within 12 months "or the next normal harvest season after contracting whichever is longer." These limitations were not included in the California version.
58 CAL. COMM. CODE § 2501(2).
59 CAL. COMM. CODE § 2502. The seller has a somewhat comparable right under
CAL. COMM. CODE § 2702(2).
60 CAL. COMM. CODE § 2510(3).
61 CAL. COMM. CODE §§ 2711(2)(b), 2716.
recovery. And if the seller's reasonable efforts to resell do not materialize in a sale at a reasonable price, he may recover the price from the buyer.

As to unfinished goods after the buyer's breach, the seller, aside from being given the option to complete their manufacture and thus wholly identify them to the contract, may choose to discontinue their manufacture and resell them as scrap for the purpose of avoiding loss and obtaining effective realization. However, the choice he makes of completing manufacture or selling as scrap must be in the exercise of reasonable commercial judgment. Thus, while the seller's primary remedy is through the power of resale, in the special case in which resale is not practicable, the seller is allowed the price. Again, this amounts to specific performance though not called that in the statute. However, the circumstances under which this kind of specific performance is authorized are much more reasonable than through the finding of title process under the Uniform Sales Act.

Where there has been an effective acceptance of conforming goods by the buyer, the seller becomes entitled to the price. Acceptance is the point of no return: that is, on acceptance the buyer may not reject the goods. His seller, of course, may waive and choose some other remedy. The code also provides that the price may be recovered for conforming goods which have been lost or damaged "within a commercially reasonable time after risk of their loss has passed to the buyer." For example, in the common F.O.B. seller's point or C.I.F. transaction the buyer would be liable for the price

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65 Compare Cal. Comm. Code § 2708(1): "Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this division (Section 2710), but less expenses saved in consequence of the buyer's breach," with Uniform Sales Act § 64(4).
67 However, within a reasonable time the buyer may revoke his acceptance of a lot or commercial unit if its nonconformity substantially impairs its value if the acceptance was made on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured, or if acceptance was reasonably induced by the difficulty of discovery of the nonconformity or the assurances of the seller. Cal. Comm. Code § 2608.
of conforming goods if those goods were lost or damaged within a commercially reasonable time after they had been duly delivered to the carrier or received for shipment.\textsuperscript{69} The code also permits the seller to recover the price of identified goods, although there has been no acceptance by the buyer, if the buyer refuses to pay the price as it comes due and the seller after a reasonable effort is unable to resell them at a reasonable price or without such effort if the "circumstances reasonably indicate that such effort will be unavailing."\textsuperscript{70} And where the buyer repudiates or breaches the contract subsequent to identification, the risk of loss is on the buyer for a commercially reasonable time (though the goods are in the seller's control) to the extent that the seller's effective insurance does not cover the loss.\textsuperscript{71}

Another point at which identification becomes important is when goods are tortiously injured by a third person. If the goods have been identified to the contract, the code gives a right of action to either contracting party having title or a security interest, or having a special property or an insurable interest in the goods. After recovery provision is made for an equitable distribution of whatever may be recovered in case the plaintiff is not entitled to the entire judgment recovered.\textsuperscript{72}

Thus, though identification is the starting point of many remedies, its function in title-finding is of small significance. The important thing to stress is the necessity to examine specific sections on risk of loss when damage or destruction of the goods occurs, to examine recovery of price sections when such a remedy is sought, et cetera. If there is no provision concerning the problem contained in the

\textsuperscript{69} F.O.B. seller's point contracts are dealt with in CAL. COMM. CODE § 2509(1)(a), and C.I.F. contracts in CAL. COMM. CODE §§ 2320-21, 2323. Where the contract requires or authorizes the seller to ship the goods by carrier and it "does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer." CAL. COMM. CODE § 2509(1)(b).

"Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer"
\(\textsuperscript{70}\) CAL. COMM. CODE § 2709(1)(b).

\(\textsuperscript{71}\) CAL. COMM. CODE § 2722.

\(\textsuperscript{72}\) CAL. COMM. CODE § 2722.
code—which will be a rare event—then whether title has passed may become an important issue.\textsuperscript{73}

Types of Goods—"Movables" Under the Code

All things which are movable at the time of identification to the contract of sale, including things specially manufactured, come within the definition of "goods." But money in which the price is to be paid, investment securities, and things in action are not within this term. The unborn young of animals and growing crops and timber to be cut, under the California version, fall within this term. Thus, a contract of sale of the two last mentioned products, as well as other things attached to the realty which are capable of being removed without material injury to the realty, is a contract for the sale of goods whether the severing is to be done by buyer or seller.\textsuperscript{74} And by identification, the parties can effect a present sale before severance.\textsuperscript{75} The code permits a recording of such sales or contracts of sale as documents transferring an interest in land so as to give notice to third parties of the buyer's rights under these contracts.\textsuperscript{76} The reference to things attached to the realty which may be removed without material harm to the realty is to chattels commonly termed "fixtures." The code has generally avoided the use of this term because of the confusion existing in prior case law as to what chattels come within this descriptive term.\textsuperscript{77}

A contract for the sale of minerals "or the like" or a structure or its materials to be removed from realty is considered a contract for the sale of goods provided they are \textit{to be severed by the seller} but, contrary to the case of the young of animals, or crops, or timber (under the California version), there can be no present sale upon identification but only after severance.\textsuperscript{78} A present sale of such interests prior to severance can be made only through a formal

\textsuperscript{73} See \textsc{Cal. Comm. Code} § 1103.
\textsuperscript{74} \textsc{Cal. Comm. Code} §§ 2105(1), 2107(2). Compare the U.C.C. provision re timber, § 2-107(1).
\textsuperscript{75} \textsc{Cal. Comm. Code} § 2107(2).
\textsuperscript{76} \textsc{Cal. Comm. Code} § 2107(3).
\textsuperscript{77} See \textsc{U.C.C.} § 2-107, comment 2. But see \textsc{U.C.C.} § 9-401, first alternative subsection (1)(a), second alternative subsection (1)(b), third alternative subsection (1)(b), where the term "fixtures" is used. The California version omits all reference to "fixtures." \textsc{Cal. Comm. Code} § 9401.
\textsuperscript{78} \textsc{Cal. Comm. Code} § 2107(1). "If the buyer is to sever, such transactions are considered contracts affecting land and all problems of the Statute of Frauds and of the recording of land rights apply to them." \textsc{U.C.C.} § 2-107(1), comment 1.
real property transfer. Under the official code standing timber is also within this area; therefore, prior to severance there cannot be a present sale. This differs from the approach of the Uniform Sales Act and the English viewpoint which provide that things attached to the land which, under the contract of sale, are to be severed and removed are subjects of present sale. But the Uniform Sales Act has no provision for filing such contracts as does the code. This omission presented serious problems when conflicting interests were involved, such as those of a subsequent purchaser or mortgagee of the land or of things attached to the land, or of the seller’s attaching creditors. The filing provision of the new code now makes it possible to safeguard interests thus acquired through such informal contracts of sale.

“Future goods,” under the code, are defined as those which are not both existing and identified, and interests in them cannot pass until such is the case. Under the Uniform Sales Act future goods are those “to be manufactured or acquired by the seller after the making of the contract of sale.” As has been stated heretofore, crops to be grown and animals to be born are existing and can be identified as early as their planting in case of crops and at their conception in case of animals. It is at these points that interests in these chattels can be conveyed. As to fungibles, the existence and identification of the bulk or mass from which a portion by number, weight or other measure is purchased determines whether an interest in common in them passes. But “fungible” under the official code (though not under the California version) is defined differently from the definition in the Uniform Sales Act, thus:

“Fungible” with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this Act to the extent that under a particular agreement or document unlike units are treated as equivalents.

70 Uniform Sales Act § 76(1) defines “goods” as including “all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.” The new Code makes no distinction between industrial and other crops. Cal. Comm. Code § 2105(1).

80 Cal. Comm. Code § 2105(2). The physical impossibility prior to existence and identification is self-evident.

81 Uniform Sales Act § 76(1). As under the Uniform Sales Act, a contract purporting to make a present sale of future goods or any interest therein remains a contract to sell and not a sale. Cal. Comm. Code § 2105(2).


83 U.C.C. § 1-201(17).
The California version omits the second sentence so that it is in accord with the preceding Uniform Sales Act provision except that securities are there included as fungibles. The comment to the official code section states that this sentence was added "for clarity and accuracy." It would seem that without this additional sentence the intent of the parties would control as it did under the Uniform Sales Act, provided the parties agree to an identification of the mass of which the subject matter of purchase is a part.

Statute of Frauds

This new Statute of Frauds concerning sales of goods for a price (not "value" as set out in the Uniform Sales Act) of 500 dollars or more differs materially from that of the Uniform Sales Act which was drafted on the order of the English legislation of 1677. The philosophy behind it is that "the writing afford a basis for believing that the offered oral evidence rests on a real transaction." There must be some writing which indicates that a contract of sale has been made between the parties and it must be signed by the party against whom enforcement is sought. But such a writing may omit or incorrectly state a term agreed upon and still be sufficient, but not beyond the quantity of goods shown on the writing. In fact, the only term required is the

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84 Compare U.C.C. § 1-201(17), with Cal. Comm. Code § 1201(7), and Uniform Sales Act § 76.
85 U.C.C. § 1-201, comment 17.
86 Cal. Comm. Code § 2501(1); see I Williston, Sales § 159 (1948). Therefore in California where the goods would not be defined as "fungible" under the code, but where they are nevertheless an indistinguishable part of a mass and "identification" is intended by the parties, identification will occur allowing the passage of title and thereby constituting a present sale. Cal. Comm. Code § 2401(1).
87 Compare Cal. Comm. Code § 2201, with Uniform Sales Act § 4, which was based on 29 Car. 2, § 17 (1677), and reads: "(1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upward shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf." Then follows subsection (2) providing particularly for the special case of goods to be manufactured by the seller for the buyer which are not suitable for sale to others in the ordinary course of the seller's business. In such case, the provisions of the first section would not apply. Under the new code, other provisions functioning as a Statute of Frauds are contained in the following sections: securities, Cal. Comm. Code § 8319; that for personal property not otherwise covered, Cal. Comm. Code § 1206; and for enforceability of secured transactions, Cal. Comm. Code § 2903.
88 U.C.C. § 2-201, comment 1.
quantity term (and this need not be accurately stated), but recovery is limited to the amount stated. "The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted." Thus, besides evidencing a contract of sale and being signed, it must specify a quantity, otherwise it is not enforceable.

There are also provisions concerning written confirmations of such contracts by one merchant to another which aim to protect against a merchant-party's inadvertance or downright fraud when it is to his advantage to use the no-signed-memorandum defense. Contracts for goods to be specially manufactured for the buyer (goods which are not suitable for sale to others in the ordinary course of the seller's business) where the seller has made substantial progress in their manufacture or has made commitments for their procurement are excepted from the operation of the statute, provided the progress has been made prior to notice of the buyer's repudiation and the circumstances are such as reasonably to indicate that the goods are for the buyer. The conditions as set forth above protect the seller in the unusual case where he has made a substantial beginning in the manufacturing process or has entered into commitments for materials for the consummation of the contract, but leaves him high and dry where the conditions are not satisfied. This cures a considerable deficiency of the Uniform Sales Act provision which did not require more than a contract for goods to be specially manufactured for the buyer which goods were not suitable for sale to others in the seller's ordinary course of business, a provision which opened this area to possible fraud. As has been said of this provision, "The fact that S manufactures some special goods for B does not prove that B requested him to do it, and even if it did, there is no proof of the quantity term of the resultant contract." Since oral contracts under the new code can be validated by written confirmation, the practical solution is through the confirmation of all oral contracts of sale, thus binding the other merchant-party who has not signed if he does not respond contrariwise within the ten days set by the statute.

The official code contains a provision to the effect that if one

89 Ibid.
90 See text accompanying notes 11-19 supra.
91 Cal. COMM. CODE § 2201(3).
93 See text accompanying notes 11-19 supra.
“against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made,” the contract is enforceable if valid in other respects, but not beyond the quantity of goods admitted. There is some question whether a demurrer would constitute such an admission since it admits the facts alleged only for the purpose of questioning the legal sufficiency of the pleading. And there is also a problem of whether admissions in pre-trial proceedings would suffice. California has not adopted this part of the statute presumably for the reason that such a rule would encourage the commission of perjury by false denial of the making of a contract. California is apparently the only one of the thirty jurisdictions thus far enacting the code that has taken this position, and the comment of the Permanent Editorial Board of the Uniform Commercial Code has flatly rejected this stand. The question should be asked whether this is the proper way of discouraging false assertions under oath or whether this should be left to the criminal statutes punishing perjury. Is it not equally immoral to permit one to escape an honest contract which honest men would likely admit in pleading or on the witness stand, if called by the plaintiff?

One further provision states that “with respect to goods for which payment has been made and accepted or which have been received and accepted,” provided the contract is otherwise valid, it is enforceable to the extent of the accepted payment or reception. This avoids the fraud possible under the Uniform Sales Act provision which permits the oral contract in all its aspects to be admissible if part payment has been made or goods of any amount have been received and accepted by the buyer.

While the late Professor Williston considered the code’s Statute of Frauds iconoclastic, it should prevent rather than encourage fraud. Professor Corbin, who found it necessary to write a sizeable volume on the previous statute’s holdings in this area, concluded that the new approach was to be preferred to the old. There should be less evasion

94 U.C.C. § 2-201(3)(b).
95 PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT NO. 2, REPORT ON VARIATIONS TO CODE IN ADOPTING STATES, U.C.C. § 2-201(3), comment (1964).
96 CAL. COMM. CODE § 2201(3)c.
97 Williston, The Law of Sales in the Proposed Uniform Commercial Code, 63 HARV. L. REV. 561, 572 (1950). He describes the Statute of Frauds provisions as “the most iconoclastic in the Code.” This article concerned an early draft and many important changes were made in successive drafts up to the 1962 version, but the Statute of Frauds’ provisions are essentially the same as when Williston wrote.
98 Corbin, The Uniform Commercial Code-Sales; Should it be Enacted?, 59 YALE
of honest contracts than was formerly the case. And the view commonly prevalent under the earlier statute that all essential terms of the contract must appear in the memorandum in order for the memorandum to constitute compliance with the statute can no longer be sustained. "Iconoclastic" perhaps, but based upon reasonable assumptions of what honest men should be permitted to do.

**Conclusion**

It should be apparent from the above discussion that in order to understand the basic philosophy of Article 2 of the Uniform Commercial Code an entirely new approach and mode of thinking must be employed. Whereas title was of supreme importance under the Uniform Sales Act, it is of little importance under the new code. Whereas prior to now appropriation was used in the title determining process, identification will be the term most used under the new code. The search for specific remedies provided in the code will lead one to a solution whether or not title has passed; and in the matter of drafting or counseling the code gives adequate leeway for protective devices for avoiding unexpected results. Differences in dealings between professionals and nonprofessionals must be recognized, and practically all that has been learned under the previous Statute of Frauds applicable to contracts of sale will be of little assistance under the code provisions. Through the recording provisions concerning sales and contracts of sale of crops, timber (in the California version), and fixtures reasonable security in such transactions is assured and if a secured transaction is involved, Article 9 of the code provides protection through a similar recording process.

L.J. 821, 830-34 (1950). Corbin had his reservations, but the essence of these pages is that fraudulent practices are less possible under the new code's provisions. Corbin's article makes reference to the same early draft Williston discussed.